

TENTATIVE RULINGS

FOR: August 27, 2015

Please note that the court will **strictly enforce** filing deadlines for papers filed in support of and in opposition to law and motion matters, and may exercise its discretion to disregard a late filed paper, pursuant to California Rules of Court, rule 3.1300(d).

When calculating filing deadlines for papers to be filed within a certain number of **court** days from a hearing date, parties should exclude court holidays and court closure days.

Unlawful Detainer Cases - No tentative ruling will be posted because access to records is not permitted until 60 days after the complaint is filed. Parties **must appear** for all unlawful detainer demurrers, motions to quash, and other matters.

Court Reporting Services - Official court reporters are not provided by the Court in proceedings for which such services are not legally mandated. These proceedings include civil law and motion matters. If counsel wish to have the hearing on their civil law and motion matter reported, they must arrange for a private court reporter of their choosing to be present. The Napa County Bar Association has further information about local private court reporters. Go to <http://napacountybar.org/court-reporting-services/> for further information.

Attorneys or parties should confer with each other to avoid having more than one court reporter present for the same matter.

PROBATE CALENDAR – Hon. Diane Price, Dept. F (Criminal Courts Bldg.- 1111 Third St.)

Conservatorship of Antoine C. Farray

26-63646

REVIEW HEARING AND ACCOUNTING

APPEARANCE REQUIRED. Hearing on this matter was previously continued on June 10, 2015 and again on July 31, 2015 to allow the Conservator to file an accounting as required for conservatorships of the estate pursuant to Probate Code section 2620, subdivision (a). Conservator has again failed to file a complete accounting with all of the appropriate supporting documentation. The Report of Court-Appointed Counsel Regarding Conservator's Accounting, filed on August 24, 2015, is well-taken.

As noted by Court-Appointed Counsel, the accounting does not cover the full period of the Conservator's appointment. Here, the Conservator was appointed on May 5, 2014, but the

accounting begins on May 13, 2014. While there are now pages from account statements showing account balances from various periods, no complete account statements are filed. Furthermore, Probate Code section 2620, subdivision (c)(2) requires the conservator to provide with the first court accounting of the conservatorship "all account statement showing the account balance **immediately preceding** the date the conservator or guardian was appointed[.]". There are no account statements covering the period immediately prior to May 5, 2014 for the three Charles Schwab accounts.

There is now a single page from a statement for the period of May 1 through May 31, 2014 from Silverado Care, but there are no other statements from any residential or long-term care facility. The Silverado Care statement indicates a move-in date of December 30, 2014, and there is a cancelled check to Ville Marche dated July 18, 2014, but no statements from Ville Marche. Per Probate Code section 2620, subdivision (c)(5), "the filing shall include the original bill statements for the facility."

The Inventory and Appraisal has now been filed, but it was not signed by the attorney, and a probate referee was not retained as required by Probate Code sections 8901 and 8902 to appraise the residence, personal effects, vehicles, coins, stock, etc. (See Court-Appointed Counsel's Report, paragraphs 9-11).

Conservator also again failed to file mandatory Judicial Council form GC-400. The accounting is also deficient as noted by Court-Appointed Counsel; see Court-Appointed Counsel's Report, paragraphs 12, 14).

The questionable entries for which there was no explanation in the previous inadequate accounting (loans to family members, expenses for a vehicle that Conservatee does not drive, money spent on gambling, and significant property expenses) remain unexplained. Additionally, the transactions noted by Court-Appointed Counsel are also deficient. (See Court-Appointed Counsel's Report, paragraphs 15-21).

Finally, legal counsel was improperly paid without court order, in violation of California Rules of Court, Rule 7.755, and Napa Local Court Rules, Rule 9.7. Rule 7.755 provides "the attorney for a guardian or conservator must not receive, any payment from the estate of the ward or conservatee for services rendered in advance of an order of the court authorizing the payment. If an advance payment is made or received, the court may surcharge the guardian or conservator in the manner provided in rule 7.700(b), in addition to removing the guardian or conservator or imposing any other sanction authorized by law on the guardian or conservator or on the attorney." The court will therefore surcharge the Conservator in the amount of \$12,902.

Given the Conservator's continued failings as documented above, the court will suspend the powers of the Conservator and appoint a temporary conservator, pursuant to Probate Code section 2620.2, subdivision (c)(3).

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Conservatorship of Maria Cantera

26-64296

REVIEW HEARING

TENTATIVE RULING: After a review of the matter, the court finds the conservator is acting in the best interest of the conservatee. Thus, the case is set for a biennial review hearing in two years, on August 25, 2017 at 8:30 a.m. in Dept. F. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

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Estate of Robert E. Barwick

26-66810

PETITION FOR PROBATE OF WILL AND FOR LETTERS TESTAMENTARY AND
AUTHORIZATION TO ADMINISTER UNDER THE INDEPENDENT ADMINISTRATION
OF ESTATES ACT

TENTATIVE RULING: The Petition is GRANTED.

**CIVIL LAW & MOTION CALENDAR – Hon. Diane Price, Dept. F (Criminal
Courts Bldg.-1111 Third St.)**

Animal Legal Defense Fund v. LT Napa Partners, LLC, et al.

26-61166

MOTION OF PLAINTIFF ANIMAL LEGAL DEFENSE FUND FOR ATTORNEYS' FEES
AND COSTS PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 425.16

TENTATIVE RULING: The Motion is DENIED. Plaintiff has not shown that Defendants' special motion to strike was frivolous or is solely intended to cause unnecessary delay, as required by Code of Civil Procedure section 425.16, subdivision (c)(1). To be frivolous, the Defendants' motion to strike must have been totally and completely without merit or for the sole purpose of harassing an opposing party. (Code Civ. Proc., § 128.5(b)(2).) Plaintiff cannot make such a showing in this case.

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Stamatia Marr v. Antony Cartlidge, et al.

26-64480

DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

TENTATIVE RULING: As an initial matter, Plaintiff failed to file and serve a timely opposition to Defendant's Demurrer. Plaintiff's opposition was only filed and served eight court days before hearing. Code of Civil Procedure section 1005, subdivision (b), requires all opposing papers to be filed and served at least nine court days before the hearing. Plaintiff's filing and

service of the opposition was not in compliance with section 1005. The court has considered Plaintiff's opposition only because Defendant was able to file a substantive reply.

Defendant's Demurrer is **OVERRULED**. Defendant argues that Plaintiff's Fourth Cause of Action for Intentional Misrepresentation and Concealment relies on Defendant's alleged oral promise to be personally responsible to repay the loan made to Greenfield Wine Company. While the statute of frauds may bar enforcement of the oral promise to pay the debt of another, Defendant has cited no authority for the proposition that the statute of frauds would also bar Plaintiff's claim for intentional misrepresentation and concealment based on Defendant's oral statements. Rather, it appears that a fraud action may not be barred even when the allegedly fraudulent promise is unenforceable under the statute of frauds. (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18.)

Defendant is to file an answer within 10 days.

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Victor Mirzayan v. Arthur Haroutiounian, et al.

26-66486

DEMURRER TO THE COMPLAINT

TENTATIVE RULING:

Defendant Napa Valley Limoncello, LLC (NVLC) demurrer to the first cause of action for accounting and appointment of receiver, second cause of action (count one: buy-back/repurchase provision, count two: quarterly bonus/lost profits, and count three: covenants not to compete/disclose), third cause of action for breach of oral contract (\$100,000 loan), fourth cause of action for promissory estoppel (\$100,000 loan), fifth cause of action for common counts (money had and received ó \$100,000), sixth cause of action (count one: promise made without intent to perform ó \$100,000) and count two: promise made without intent to perform ó 12.5% stake), seventh cause of action for constructive trust, fourteenth cause of action for breach of the implied covenant of good faith and fair dealing, fifteenth cause of action for conversion, sixteenth cause of action for securities fraud (fraud inducing the purchase of securities), seventeenth cause of action for negligent misrepresentation in the sale of securities, eighteenth cause of action for unjust enrichment, nineteenth cause of action for conspiracy to breach the duty of loyalty and implied covenant of good faith and fair dealing, and twentieth cause of action for violation of Business and Professions Code section 17200 on the ground of uncertainty is **OVERRULED**.¹ An uncertainty demurrer is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures. (See *Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.) A demurrer for uncertainty should only be sustained when the complaint is so bad that the defendant cannot reasonably respond. (*Id.*) The complaint here is certain enough to allow NVLC to understand the nature of the allegations, and the theory of liability in order to fashion an appropriate response.

¹ No twelfth or thirteenth causes of action are alleged in the complaint.

NVLC's demurrer to the first cause of action for accounting and appointment of receiver on the ground of failure to state sufficient facts is **OVERRULED**. NVLC argues that the Corporations Code does not provide a right to an accounting. NVLC ignores paragraph 42 of the complaint, which provides that plaintiff is entitled to reports about NVLC's financial status as part of the agreement between the parties.

NVLC's demurrer to the second cause of action for breach of contract (count one: buy-back/repurchase provision) on the ground of failure to state sufficient facts is **OVERRULED**. NVLC contends this claim is deficient because there never was an amount agreed upon for a buy-back. However, pursuant to paragraph 7 of the agreement, plaintiff asked to have his equity share of NVLC repurchased. (Compl., ¶¶ 40, 49, 51.) This request was rebuffed and delayed in bad faith despite the agreement that NVLC would do everything in its power to make the money available. Under these circumstances, no amount need be stated since it is the violation of the agreement's buy-back provision that serves as the basis of this breach of contract claim.

NVLC's demurrer to the second cause of action for breach of contract (count two: quarterly bonus/lost profits) on the ground of failure to state sufficient facts is **OVERRULED**. NVLC states the existence of profits was a condition precedent to payment. NVLC does not cite in its argument section the support for this position. (See Mem. at p. 27:6-11.) Even if the existence of profits was a condition precedent, plaintiff alleges that NVLC's income is unknown because no accounting of profits has been provided. (Compl., ¶ 62.) It appears that NVLC's purported stonewalling has prevented the very condition precedent from taking place that it now maintains is deficiently alleged. This is improper. For purposes of this demurrer, less specificity is required when facts lie more within NVLC's knowledge than within plaintiff's knowledge. (*Comm. on Children's Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 217; see *Eldridge v. Tymshare, Inc.* (1986) 186 Cal.App.3d 767, 777.)

NVLC's demurrer to the third cause of action for breach of oral contract (\$100,000 loan), fourth cause of action for promissory estoppel (\$100,000 loan), fifth cause of action for common counts (money had and received of \$100,000), and seventh cause of action for constructive trust on the ground of failure to state sufficient facts is **OVERRULED**. NVLC maintains it was not a party to the oral contract, and it did not agree to be bound by the contract. These contentions lack merit. Plaintiff alleges he tendered a check in the amount of \$100,000 to Napa Valley Distillery as a loan. (Compl., ¶ 81.) NVLC does business as Napa Valley Distillery. (*Id.*, ¶¶ 4, 80.) Arthur Haroutiounian signed the back of the check. (*Id.*, ¶ 82.) Haroutiounian owns a major portion of the company, and is its managing member. (*Id.*, ¶¶ 6, 35, 80.) Thus, plaintiff alleges Haroutiounian accepted a loan from plaintiff on behalf of NVLC.

NVLC's demurrer to the sixth cause of action for fraud (count one: promise made without intent to perform of \$100,000 and count two: promise made without intent to perform of 12.5% stake), sixteenth cause of action for securities fraud (fraud inducing the purchase of securities), and seventeenth cause of action for negligent misrepresentation in the sale of securities on the ground of failure to state sufficient facts is **OVERRULED**. NVLC avers these claims are not alleged with the requisite specificity. In particular, NVLC asserts plaintiff fails to identify the names of the persons associated with NVLC, and their authority to speak. The Court disagrees. (See *id.*, ¶¶ 6, 35, 103, 111, 188, 198 [alleging Haroutiounian owns a major portion

of NVLC, and is its managing member].) Further, NVLC's arguments that no amount ever was agreed upon for a buy-back and that it was not a party to the contract lacks merit for the same reasons noted above.

NVLC's demurrer to the eighth cause of action for intentional or negligent misrepresentation on the ground of failure to state sufficient facts and uncertainty is **SUSTAINED WITH LEAVE TO AMEND**. Plaintiff acknowledges in his opposition that he omitted an element for negligent misrepresentation. (Opp. at p. 1:9-10.)

NVLC's demurrer to the ninth cause of action for breach of fiduciary duty ó duty of loyalty, tenth cause of action for breach of fiduciary duty ó misappropriation of LLC assets and/or opportunities, and eleventh cause of action for breach of fiduciary duty ó competition with the company on the grounds of failure to state sufficient facts and uncertainty is **SUSTAINED WITHOUT LEAVE TO AMEND**. Plaintiff acknowledges in his opposition that he does not seek to bring claims for breach of fiduciary duty against NVLC. (*Id.* at p. 8:1-3.)

NVLC's demurrer to the nineteenth cause of action for conspiracy to breach the duty of loyalty and implied covenant of good faith and fair dealing on the ground of failure to state sufficient facts is **OVERRULED**. As NVLC proffers: "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." (*Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-11.) What NVLC failed to raise, however, is the remainder of the quote: a conspiracy "must be activated by the commission of an actual tort." (*Id.*) NVLC fails to argue that any of the alleged torts cannot serve as the predicate underlying tort or statutory violation necessary for a conspiracy cause of action.

NVLC's demurrer to the twentieth cause of action for aiding and abetting the breach of the duty of loyalty and implied covenant of good faith and fair dealing on the ground of uncertainty is **OVERRULED**. The claim is not brought against NVLC. (See Compl. at p. 42:11.)

If plaintiff elects to file an amended pleading, he may do so within 10 calendar days of the date of service of notice of entry of order. Plaintiff is instructed to correct the error in the numbering of his causes of action. Plaintiff additionally is instructed to comply with California Rules of Court, rule 2.112, which requires that each cause of action must state the party to whom it is directed.

PROBATE CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111 Third St.)

In the Matter of Beard Family Trust

26-58301

FOURTH ACCOUNT AND REPORT OF SUCCESSOR TRUSTEE, PETITION FOR SETTLEMENT, FOR ALLOWANCE OF DISTRIBUTIONS TO BENEFICIARY AND APPROVING COMPENSATION TO TRUSTEE AND ATTORNEYS

APPEARANCE REQUIRED

CIVIL LAW & MOTION CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111 Third St.)

Sullivan Vineyards v. Kelleen Sullivan Finn

26-67001

(1) APPLICATION FOR ORDER AUTHORIZING PLAINTIFFS TO CONTINUE OPERATING IN THE ORDINARY COURSE OF BUSINESS AND TO CONSUMMATE SALE OF ASSETS

APPEARANCE REQUIRED

(2) MOTION TO SEAL

TENTATIVE RULING: Plaintiffs' Motion is DENIED. Pursuant to Rule 2.550(d) of the California Rules of Court, the court may order that a record be filed under seal only if it expressly finds facts that establish:

- (1) There exists an overriding interest that overcomes the right of public access to the record;
- (2) The overriding interest supports sealing the record;
- (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
- (4) The proposed sealing is narrowly tailored; and
- (5) No less restrictive means exist to achieve the overriding interest.

Plaintiffs have not presented any facts or arguments that would support such findings. Plaintiffs' argument in their memorandum consists of a single sentence: "There are a number of creditors and investors that Plaintiff did not wish to have access to this sensitive, confidential and proprietary information." This does not provide a sufficient basis for sealing. "A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing." (Cal. Rules of Court, rule 2.551(b)(1).) "Unless confidentiality is required by law, court records are presumed to be open." (Cal. Rules of Court, rule 2.550(c).)